1991

Reed v. Forrer : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

RT OF THE STATE OF UTAH

HENRY H. FORRER,

Plaintiff-Appellant,

vs.

STUART REED, RUSSELL REED, DONALD REED, FRANKLIN REED, MARAGRET REED, CORDIE MAE REED and LAWANNA KAY REED,

Defendants-Counter-Plaintiffs and Respondents,

vs.

HENRY H. FORRER, ROBERT SATHER, EZILDA HENDRICKS, CHARLES HENDRICKS, ROGER L. ROBERSON and ETHEL LaVERNIA ROBERSON,

Counter-Defendants and Appellants.

Case No. 14572

RESPONDENTS' BRIEF

Appeal from Judgment of the Fourth District Court
Uintah County, State of Utah
The Honorable George E. Ballif, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

HENRY H. FORRER, Plaintiff-Appellant, vs. STUART REED, RUSSELL REED, DONALD REED, FRANKLIN REED, MARAGRET REED, CORDIE MAE REED and LAWANNA KAY REED, Defendants-Counter-Plaintiffs and Respondents, vs. HENRY H. FORRER, ROBERT SATHER, EZILDA HENDRICKS, CHARLES HENDRICKS, ROGER L. ROBERSON and ETHEL LaVERNIA ROBERSON, Counter-Defendants and Appellants.	Case No. 14572

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RESPONDENTS' BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action to quiet title in the plaintiff, Henry H. Forrer and his wife (hereafter the "Forrers") to a certain piece of real property located in Uintah County, State of Utah and described as follows (hereafter the "subject property"):

> TOWNSHIP 2 NORTH, RANGE 1 WEST, U.S.M.
>
> Section 35: The East half of the Southeast quarter of the Northwest quarter; the West half of the Southwest quarter of the Northeast quarter.

The defendants-counter-plaintiffs and respondents (hereafter the

"respondents") are the record holders of a mortgage on that property and are seeking foreclosure of their mortgage. They also are seeking, in the alternative, a determination that title to said property properly lies with them by reason of an unrecorded quit-claim deed, executed by their mother, Ezilda Van Hendricks, and delivered to R. Earl Dillman, her attorney at that time.

DISPOSITION IN LOWER COURT

The trial court decreed that the plaintiff was the legal owner of the subject property but further decreed that the property was subject to the respondents' mortgage. The respondents were granted judgment on their counter-claim against the Ezilda Van Hendricks and Charles Hendricks in the amount of $15,750.00 plus $25.60 court costs and interest at the rate of eight (8%) percent per annum from the date of judgment until paid. The subject property was ordered foreclosed to satisfy said judgment. The default of Stuart Reed, Russell Reed and Donald Reed was entered.

RELIEF SOUGHT ON APPEAL

The appellants are seeking reversal of the Trial Court's decision foreclosing the property. The respondents are seeking affirmation of that decision but reversal of the Trial Court's decision in not awarding the title to the property to respondents and in not awarding respondents their attorney fees.

STATEMENT OF FACTS

The respondents agree with appellants that the Pre-Trial Stipulation entered into between the parties which contains, inter alia, a statement of facts,governs the factual situation presented to the court.

ARGUMENT

POINT I

THE TRIAL COURT'S DECISION AWARDING THE RESPONDENTS JUDGMENT AGAINST THE COUNTER-DEFENDANTS AND ORDERING THE FORECLOSURE OF THE SUBJECT PROPERTY WAS PROPER AND SHOULD BE SUSTAINED.

A. The appellants have failed to show that the trial court's decision was clearly erroneous and not supported by the evidence. The appellants failed to introduce evidence disputing the indebtedness to respondents and, in fact, stipulated that such indebtedness did exist (Stip. p. 3).[1/] Appellants further stipulated that the mortgage when created and recorded constituted a valid lien upon the subject property (Stip. p. 3) and failed to introduce any evidence proving that the indebtedness had been repaid or otherwise satisfied. Notwithstanding their stipulation to the contrary, appellants have maintained to both the trial court and in their brief herein (App. p. 3)[2/] that the mortgage was not valid. Patently, this position is untenable.

Even if appellants were allowed to raise this issue, their argument is without merit. "As a rule, anything or any interest capable of passing by purchase or descent is capable of being encumbered by a mortgage." 55 AmJur2d §106, Mortgages. Even mortgages of property to be acquired in the future were validated in equity. Id., §109. In any event, the

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1/ The Pre-Trial Stipulation of the parties will hereafter be referred to in the text as "Stip. p.__."

2/ Appellants' brief herein will be referred to in the text as "App. p.__."

title held by an Indian to restricted land is tantamount to fee ownership, with the exception that there are restrictions on alienation.[3] It has been held that the initial selection of an allotment of land is the inception of title and the patent, when issued, relates back to the allotment.[4] The appellants' argument that only recording in the County Recorder's office begins a chain of title is simply incorrect. Any competent title research must examine the status of the title from the U.S. government to insure that the patent was issued properly according to law and to insure that there are no restrictions or reservations applicable by law to the land in question.[5] Given the validity of Federal chains of title, and especially with Indian lands where ownership may be transferred prior to issuance of patent, any prudent purchaser will examine that Federal chain. Had the appellants done so in this case, they would have discovered the minority of the respondents and the trust nature of their seller to the respondents.

B. Neither the doctrine of laches nor the running of a period of limitations operates to defeat the respondents' enforcement of their mortgage. Appellants place great reliance upon the expiration of a number of years from the creation of the mortgage to its foreclosure as supportive of the argument that foreclosure should be denied. With regard to the equitable argument,

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3/ See, e.g., U.S. Oklahoma Gas & Electric Co., 60 F.Supp. 411 (1945). aff'd in part and rev'd on other grounds, 138 F.2d 730, cert. den. 331 U.S. 842.

4/ De Graffenried v. Iowa Land & Title Co., 20 Okla. 687, 95 P.624 (1908).

5/ See, e.g.,U.S. v. Frisbee,57 F.Supp. 299 (D.C. Mont. 1944) where mineral rights were preserved in the Indian notwithstanding an apparent conveyance of them by issuance of a patent. See, also, 25 U.S.C. Sec. 311-328(right-of-ways).

however, it must be noted that appellants did not introduce evidence, other than the passage of time, upon which the trial court could base a finding that the period of time was unreasonable. In fact, the record indicates that the trial court considered the minority of the respondents, the trust relationship and breaches thereof by their guardian and the trust source of the funds used to purchase the subject property by the mother in finding that the passage of time did not make it unreasonable to enforce the mortgage. In fact, the record shows that the mother brought suit subsequent to October 13, 1966, against Robert Sather to seek a quiet title to the subject property in her favor (Stip. p.2). While her suit was dismissed, this factor further supports a finding that the respondents delay in foreclosing their mortgage was justified in as much as when that suit was filed, the four youngest children were still minors. The record amply supports the trial court's decision in this regard.

In their argument regarding the statute of limitations, appellants seem to confuse §78-12-18 Utah Code Annotated (1953 rev.ed.) [providing a three year period in which to sue for recovery of estates sold by a guardian] with §78-12-23 Utah Code Annotated (1953 rev.ed.) [providing a six year period of limitations and which section has been held to apply to mortgage foreclosures. Crompton v. Jenson, 78 U. 55, 1 P2d 242(1931)]. With regard to the trial court's decision on the mortgage foreclosure, the latter period applies. Appellants contend that the appointment of the counter-defendant and mother of respondents as their guardian, on March 19, 1958, should begin the running of the per-

iod of limitations (App. p. 7ff). This argument clearly is contrary to Utah law [§78-12-21] which provides that a period of limitations does not begin running against one under a disability until that disability ends. Further, the general rule is that the appointment of a guardian does not have the effect of starting periods of limitation running [see, 86 A.L.R.2d 965, Annotation, Limitations of Actions - Disabilities]. In certain situations, the courts have started the period running when a guardian has been appointed[6/] but in those cases the guardian or trustee could have asserted the action on behalf of the minors and was not an adverse party to the minors. To apply that exception to this case would be to require the guardian to sue herself; a most illogical and untenable position despite appellants argument that this should be required [App. p. 9]. The trial court did not accept this argument and for good reason: if this were the rule, a guardian could sell property to individuals who could buy with the knowledge that the statute would begin running from that point. Upon attaining majority, the minors would find their only recourse against their guardian, the statute having run against the purchaser. Adopting appellants' argument on this point would eliminate the protection afforded those under a disability by Utah law. The trial court rejected appellants' argument and held that the statute began running when the youngest child reached majority.[7/] Apart from their argument above and their argument on severability of the respondents' interests, appellants suggest no other period

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6/ See, e.g., Jenkins v. Jensen, 24 U. 108, 66 P.773, and Dignan v. Nelson, 26 U. 186, 72 P. 936 (1903).

7/ Decision, dated January 2, 1976, page 2.

to begin the running and thus fail to carry their burden.

Appellants argued to the trial court that it should sever the interests of each of the respondents and begin the period running against each of them as they reached majority. For the respondents participating in this appeal, that argument, even if accepted, has no bearing since Franklin Reed, oldest of the participants in this appeal, reached majority on October 7, 1967 (Stip. p. 5). The statute would not run and foreclose his action until October 7, 1973. However, the respondents' claim was asserted on February 22, 1973, in advance of that time. The argument that the respondents' action was not "commenced" until the counter-claim was filed in 1974, ignores the provision of Rule 15, Utah Rules of Civil Procedure:

> "(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

In as much as respondents were granted leave to file an amended answer and counter-claim and since their original answer contained an assertion of the validity of the mortgage and lien, the amendment arose out of the original pleading and related back.

Appellants' argument on this point, however, is without merit. The mortgage was created to secure the indebtedness which arose when the respondents' trust funds were used by their mother. It was given in favor of the respondents collectively and recited one amount due. To hold that this mortgage was severable would mean, theoretically, that as each of the respondents reached majority they could make demand upon their mother for their

share of the indebtedness and, assuming a failure of payment, would then sue for foreclosure. This could mean that possibly seven separate foreclosures would be necessary; it could mean that at the time the oldest reached majority the subject property may not have had a value which would compensate all the respondents and therefore each share of the indebtedness would be smaller; this would require counsel for seven individuals (the court having to appoint counsel for the remaining minors); in net effect, it would mean judicial re-writing of the mortgage itself. This end is not reasonable and the trial court so held. In determining whether or not to partition an estate, the court must look at the consequences to the beneficiaries. For example, In re Vorhees' Estate, 12 U.2d 361, 366 P.2d 977 (1961), where partition would mean prejudicing one of the beneficiaries, it was disallowed. In this case, the one clear point in time whe it is certain that all of the respondents' are not under a disability and when all of the consequences above can be avoided is when the youngest of the respondents reaches majority.[8/] Under this construction, the respondents' action was certainly timely commenced.

In summary, respondents had a valid mortgage on the subject property and had properly recorded it (or, rather, it was recorded on their behalf). Within a permissible time after reaching majority they brought action on the indebtedness and for foreclosure. Appellants clearly had notice of the mortgage and notice that it secured repayment of trust funds. Appellants have shown no reason why the mortgage should not be foreclosed to satisfy respondents' judgment.

8/ Lawaan Kay Reed reached majority on June 15, 1970 (Stip. p. 5).

C. The trial court properly determined the amount to which respondents were entitled and properly ordered foreclosure to satisfy same. As discussed above, page 8, the appellents' argument on severability is without merit. However, they also argue that even if the mortgage is to be foreclosed, only 4/7ths of the amount of the judgment should be allowed to foreclose. This argument is apparently based upon the contention that the default of the three oldest Reed children in answering and defending their action should act to terminate said childrens' interest in the mortgage. As previously discussed, the mortgage was not severable and since the statute of limitations did not commence running until the youngest child reached majority, all interests thereunder remain preserved. Whether the respondents in this appeal hold the judgment as constructive trustees for their older brothers or whether those older brothers have any claim to the proceeds at all is not a matter for this appeal and is of no concern to appellants. The simple fact is that their default allowed the appellants to gain by default from them what appellants won by judgment from respondents herein: namely, quiet title to the land subject to the mortgage.

Appellants cite in support of their argument on severability the case of Baker v. Goodman, 57 Utah 349, 194 P. 117. That case, however, dealt with the adverse possession of land and the court held that the interest of the parties who had reached their majority were barred from contesting the adverse possession. Of course, in that case each party could bring an action to preserve his title against an adverse possessor. In this case, however, the claim which the appellants wish to bar

was founded upon the written instrument, the mortgage. As discussed previously, it is not reasonable to require the oldest Reed children to bring a foreclosure action prior to the majority of their younger siblings. Since it was not severable and since none of the interests had been barred by laches or limitations, all interests under the mortgage remain outstanding and due and the trial court properly awarded judgment based upon the evidence that none of the indebtedness which the mortgage securred had been satisfied.

POINT II

THE TRIAL COURT ERRED IN QUIETING TITLE TO THE SUBJECT PROPERTY IN APPELLANT HENRY H. FORRER AND THIS COURT SHOULD REVERSE THAT DECISION AND AWARD THE OWNERSHIP OF SAID PROPERTY TO RESPONDENTS.

A. The unrecorded Quit-Claim deeds from Charles and Ezilda Henricks to the respondents, executed and delivered sometime during the year 1959, operated to vest title in subject property in the respondents. The appellants stipulated that the deeds were executed and delivered but not recorded (Stip. p. 3-4). At that time, the respondents were all minors and the Bureau of Indian Affairs, Uintah and Ouray Reservation, notified the court (Fourth Judicial District, Uintah County, Case No. 1458) accordingly (Stip. p. 4). Prior to the execution and delivery of the deeds, Ezilda Hendricks had been appointed guardian of the respondents (Stip. p. 3). Since the ownership interest held by Ezilda Hendricks to the subject property could be conveyed (see discussion supra, pages 3 -4) by the evidence in the record that interest was conveyed to the respondents. The question pertinent to this court really is whether or not

the respondents' title to subject property could be divested by Ezilda Hendricks' subsequent conveyance of the property to the appellant Sather and his successor in interest, Henry Forrer, both of whom admittedly had no actual knowledge of the conveyance to the respondents.

B. The subject property was part of the respondents' estate in the guardianship action and could not be sold or conveyed without court approval. 39 AmJur2d §125, Guardian and Ward, states the general rule that a guardian has no authority to convey a wards' real estate without court approval unless authorized to do so by statute (at 101). Utah law is in accord with that rule [§74-13-33, Utah Code Annotated (1953 rev.ed.)] and in Andrus v. Blazzard, 23 U. 233, 63 P. 888 (1901), held that neither the guardian nor the court has the power to bind a ward's estate unless expressly authorized by law to do so. Further, it is the general rule that a ward has a right to reclaim "...property wrongfully disposed of by the guardian...[from]...third parties who knew or should have known that, for some other reason, the disposition of the property by the guardian was wrongful." 39 AmJur2d §217, Guardian and Ward, at 165. Utah courts have allowed such recovery [See, Stockyards Nat. Bank of South Omaha v. Bragg, 67 U. 60, 245 P. 966 (1925); Andrus v. Blazzard and Gappmayer v. Wilkerson, infra.]. The property does not appear as an asset in guardianship and there is no indication that the court approved or disapproved of the sale (Stip. p.5). Respondents clearly owned the land and without court approval, the sale to appellants could not operate to divest their title and they may now assert that title. The remaining question

is whether or not the respondents are now barred based upon laches, failure to record or statute of limitations, from asserting their title to subject property.

C. Neither laches nor failure to record their interests under the Quit-Claim deed operate to bar respondents' asserting title to the subject property against appellants.

As discussed above (supra, page 4ff), the trial court considered and rejected the argument that the lapse of time, in and of itself, should bar assertion of the respondents' interest. That decision was founded upon the respondents' minority. Further, with regard to this issue of recovery of the land, it must be repeated that the appellants introduced no evidence which would support the court's ruling in their favor.

Unquestionably, a recorded deed takes priority over an unrecorded deed under Utah law [§57-3-2, Utah Code Annotated (1953 rev.ed.)]. A critical element of that priority, however, is that the holder of the recorded deed must have taken it as a bona fide purchaser without actual or implied notice of the other interests claimed. Thus, the Utah court said in Gappmayer v. Wilkenson, 53 U. 236, 177 P. 763 (1918), at 245:

> "...[T]he circumstances surrounding the entire transaction were such that the defendants Wilkenson must have had knowledge that the children, the plaintiffs in this action, being nephews and nieces of the defendant Nelson and the children of Gappmeyer, who assisted in the negotiations, had an interest in the premises, and that the defendants Wilkenson, in taking title with that knowledge, took it subject to any equities or interests that the plaintiffs may have had in said premises."

In that case, the father of the defendant minor children had

executed and delivered deeds to certain property to an escrow agent but later retrieved these deeds which were never recorded. Subsequently a deed from the father to Nelson and a deed from Nelson to Wilkenson were recorded.[9/] From the record in this case, the appellants unquestionably had recorded notice that there was a trust relationship between their predecessor in interest (Ezilda Hendricks) and the respondents. The mortgage itself revealed that it securred the investment of trust funds. Further, the guardianship proceedings were a matter of record in Uintah County, the county in which subject property was located. Certainly under these circumstances a prudent purchaser would examine the transaction carefully to insure that there were no claims such as respondents' which could be asserted against him despite a clear "recorded" title. Recorded transactions only create a presumption of propriety which presumption can be overcome by evidence to the contrary [see, Controlled Receivables, Inc. v. Harman, 17 U2d 420, 413 P.2d 807 (1966)]. Because of (1) the knowledge (actual) that the respondents had at least a mortgage interest the property; (2) the knowledge (actual) that the respondents may be minors; (3) the recorded, prior guardianship proceedings; and (4) the knowledge (actual) that the respondents and their mother were part-Indian and therefore a Federal trust relationship existed, the appellants should not now be allowed to claim surprise at learning of the respondents' unrecorded, but valid title to the subject property.

Perhaps an even stronger argument to appellants' claim is seen in the actions of the Bureau of Indian Affairs.

9/ See, also, Burnham, et.al. v. Eschler, 116 U. 61, 208 P.2d 96 (1949).

It is stipulated that because the respondents' mother and step-father has wrongfully disposed of some of respondents' property, the BIA felt the respondents needed more security for their previously advanced trust funds, it insisted upon the execution of the Quit-Claim deeds in favor of respondents and notified the court in the guardianship proceeding accordingly (Stip. p. 3-4). The BIA obviously felt that it had done all that was necessary to protect respondents' interests since it knew that property of wards could not be disposed of without court order and it had notified the court of their interests. Further, it obviously felt that the Quit-Claim deeds would be recorded and hence the respondents further protected. One purpose of stare decisis is to guide citizens in the conduct of their affairs and their expectations should not be frustrated absent strong considerations of public policy.10/ While it might have followed-up to insure that the deeds were recorded, the BIA certainly provided sufficient notice of the respondents' interests that its expectations should not be frustrated. This is expecially so considering the weight of recorded information available to appellants which would reveal the respondents' interests. Again, the respondents were not only minors but also wards of the government (Stip. p. 2) and the records maintained by the BIA regarding their affairs were part of the Federal chain of title which the appellants were bound to examine for their own protection.

10/ See, e.g., Colonial Trust Co. v. Flanagan,344 Pa. 556, 25 A2d. 728, 729.

D. The respondents are not barred by reason of expiration of the statute of limitations from asserting their title to subject property against appellants. It must be re-emphasized that appellants have argued for application of § 78-12-18 to all aspects of this case. That section applies in the context of this claim for recovery of estates where it does not apply with regard to the foreclosure of the mortgage. However, the argument heretofore made regarding the running of periods of limitations is equally applicable here: the statute commenced running when the youngest of the children reached majority. As previously noted (supra, p.8,n.8) the youngest child reached majority on June 15, 1970. Thus the statute would commence running from that point and would expire on June 15, 1973. The action having been commenced in February of 1973, the statute was tolled. Further, it makes no more sense to sever the interest under the deeds than it does the interest under the mortgage. In fact, the first point at which the respondents could have become aware of the appellants' adverse interest in the property was on May 8, 1969, when the court quieted title in the subject property in the appellants as against Ezilda Hendricks by deciding "no cause of action" on her complaint.[11/] Certainly the respondents who were of age at the time of that action would be lulled into believing that since she was still the guardian for their brothers and sisters her action would preserve their interests, especially since she alleged that the sale was, in fact, a loan.

11/ That action is referred to in the stipulation (Stip. p. 2) and is captioned: Ezelda [sic] Reed Hendricks v. Robert Sather, dba Sather Jewelry and Richard Murray, Fourth Judicial District Court of Uintah County, Civil No. 5257.

POINT III

RESPONDENTS WERE ENTITLED TO BE AWARDED REASONABLE ATTORNEY FEES AS PART OF THEIR JUDGMENT AND THIS COURT SHOULD REVERSE AND REMAND WITH INSTRUCTION TO DETERMINE AND AWARD SAME.

A. The mortgage provided for attorney fees in the event of default, only the amount thereof being left unspecified and it was unreasonable to interpret that provision as barring assessment of attorney fees. Under Utah law, the court must determine and assess "reasonable" attorney fees in foreclosure actions [§78-37-9, Utah Code Annotated (1953 rev.ed.)]. In as much as it has been held that the court must make this determination independently of any contracted for amount[12/] the failure to specify a sum certain for attorney fees should not bar their award. Again, since the court must determine "reasonable" attorney fees, it should not be necessary to include that word; it is read-in as a matter of law of mortgages. If the parties had not intended to provide for attorney fees, it is a more reasonable interpretation that they would strike any reference to attorney fees instead of just leaving the amount blank. The attorney fees are a lien upon the mortgaged premises[13/] and should therefore be included in the order of foreclosure. In as much as the mortgagors occupied a trust relationship with the mortgagees, the document should be strictly construed against the mortgagors. The Trial Court not having determined fees, this court should remand with instructions to calculate the amount of attorney fees, including fees and costs of this appeal, and award same.

12/ See, Jensen v. Lichtenstein, 45 U. 320, 145 P. 1036 (1915); See, also, F.M.A. Financial Corp. v. Build, Inc., 17 U2d 80, 404 P.2d 670 ( ).

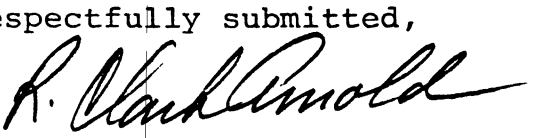
13/ Jensen v. Lichtenstein, supra, n.12.

CONCLUSION

Based upon the foregoing arguments, respondents urge this court to affirm the trial court's decision awarding respondents a judgment and order of sale of the subject property. Provided, however, respondents urge this court to reverse the trial court's decision denying respondents their attorney fees and to remand the case to the trial court for determination of attorney fees due respondents for all aspects of this case, including this appeal, and for further instructions to enter judgment in the amount as determined by the trial court and for inclusion of that amount in the decree of foreclosure and order of sale.

Alternatively, respondents urge this court to reverse the trial court's decision quieting title to subject property in appellants and to remand this case to the trial court with instructions to quiet title in the subject property in the respondents and to enter judgment in their favor for their attorney fees and costs incurred in this action, including this appeal.

Respectfully submitted,



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MAILING CERTIFICATE

The undersigned hereby certifies that on the 28th day of September, 1976, he properly mailed two copies each to each of the following attorneys at the addresses as indicated next to their names, postage prepaid.

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